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The First Amendment to the Constitution of the United States clearly prohibits the federal government from establishing a government religion or abridging freedom of speech,¹ and the Fourteenth Amendment to the Constitution has been found by the United States Supreme Court to apply the requirements and prohibitions on the federal government in the Bill of Rights to the governments of individual states. Furthermore, the due process clause of the Fourteenth Amendment states, “No State shall . . . deprive any person of life, liberty, or property, without due process of law.”² The Fourteenth and First Amendments are the main principles on which judicial rulings on the legality of state bans on teachers teaching certain content or subjects have been based. In recent years, multiple states have enacted laws prohibiting school districts from including instruction in certain concepts,³ including the concept “that racism is systemically embedded in American society,”⁴ in the school curriculum. Notably, these laws do not just effectively prohibit teachers from teaching students that the concepts are correct; they also prevent teachers from including and discussing them in the curriculum at all. In order to determine whether laws such as those enacted recently in multiple states violate the Constitution, the specific language of prior Supreme Court rulings relating to the teaching of content in schools and the principles included in the First and Fourteenth Amendments on which those rulings are based must be considered.

¹ U.S. Const. amend. I.

² U.S. Const. amend. XIV, § 1.

³ Terry Gross, *From slavery to socialism, new legislation restricts what teachers can discuss*, NPR.ORG, Feb. 3, 2022, <https://www.npr.org/2022/02/03/1077878538/legislation-restricts-what-teachers-can-discuss>.

⁴ Michelle Griffith, *North Dakota governor signs bill banning critical race theory in K-12 schools*, INFORUM (2021), <https://www.inforum.com/news/north-dakota/north-dakota-governor-signs-bill-banning-critical-race-theory-in-k-12-schools> (last visited May 18, 2023).

In 1923, the United States Supreme Court ruled in *Meyer v. Nebraska* that it is unconstitutional for a state to forbid the teaching of German, in a somewhat nuanced ruling based on the due process clause of the Fourteenth Amendment that cannot be construed to be equivalent to a blanket prohibition on states regulating the teaching of subjects. The ruling noted that the liberty protected by the due process clause includes both the right to be physically free and the right “To acquire useful knowledge,”⁵ a statement of particular relevance with regard to prohibitions on education. Under this interpretation of the Fourteenth Amendment, the rights violated by Nebraska’s prohibition on teachers teaching foreign languages to students in grades below eighth grade included both the liberty of the teacher who taught German and the liberty of the parents of the students. In *Meyer*, though, Justice McReynolds, writing the majority opinion, does not say that all such prohibitions on educational content are forbidden; he instead carefully analyzes the law and the application of the law and concludes that the application of the law is arbitrary and does not advance the state’s interests.

Forty-five years later, in 1968, the Supreme Court struck down Arkansas’ ban on the teaching of the theory of evolution. Unlike the 1923 case, which relied solely on the due process clause of the Fourteenth Amendment, the ruling in *Epperson v. Arkansas* was intentionally based upon both the establishment clause of the First Amendment and the expansion of that clause to the states by the Fourteenth Amendment, in order to avoid revisiting the *Meyer* case.⁶ The majority opinion by Justice Fortas makes it extremely clear that any prohibition on the teaching of content driven by religious motives is a blatantly unconstitutional violation of the First Amendment.

⁵ *Meyer v. Nebraska*, 262 U.S. 390 (1923)

⁶ *Epperson v. Arkansas*, 393 U.S. 97 (1968)

Of special interest to evaluating recent laws that prohibit school curriculum from including certain content, the majority opinion in *Meyer* explicitly states that the authority of individual states to regulate school curriculum is not affected by the court's decision. On a purely textual reading of both the *Meyer* opinion and a recent North Dakota law, which states in part, "A school district or public school may not include instruction relating to critical race theory in any portion of the district's required curriculum,"⁷ it appears that by referring to curriculum, the North Dakota law bypasses the scope of the *Meyer* ruling entirely. Since the introduction to the bill, which includes the phrase "relating to the prohibiting of teaching of critical race theory in public schools,"⁸ makes clear that the intent is to prevent the teaching of certain concepts, the impact of the law and its relation to a state interest can still be analyzed in a similar way as it was in *Meyer*.⁹ Like the *Meyer* majority opinion, the *Epperson* majority opinion affirms that states have a right to dictate curriculum, but it states that that right does not give them the authority to "prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment."¹⁰ While the *Epperson* opinion is specifically referring to the Arkansas law's violation of the establishment clause, that definitive statement could also be used to support invalidating the constitutionality of a law that violates other clauses of the First Amendment, including the clause which protects freedom of speech. Considering the precedent set by both *Meyer v. Nebraska* and *Epperson v. Arkansas*, deciding whether a specific law restricting the teaching of content is unconstitutional depends on a careful analysis on whether or not the law

⁷ Michelle Griffith, *North Dakota governor signs bill banning critical race theory in K-12 schools*, INFORUM (2021), <https://www.inforum.com/news/north-dakota/north-dakota-governor-signs-bill-banning-critical-race-theory-in-k-12-schools> (last visited May 18, 2023).

⁸ *Id.*

⁹ *Meyer v. Nebraska*, 262 U.S. 390 (1923)

¹⁰ *Epperson v. Arkansas*, 393 U.S. 97 (1968)

unduly abridges either the liberty offered by the due process clause of the Fourteenth Amendment or the protection of freedom of speech found in the First Amendment. If a law violates either of these principles, it is unconstitutional; one violation of the Constitution is one too many for a law to be legally valid. This analysis must, as the analysis in *Meyer v. Nebraska* does, take into consideration whether the law advances a state interest and provides sufficient justification to warrant a restriction of civil liberties or freedom of speech.

The freedom of speech protected by the First Amendment is not absolute. The due process clause of the Fourteenth Amendment by design protects civil liberties only from being unjustly restricted, not from being restricted altogether. Thus, laws restricting the teaching of content in schools are likely unconstitutional if they are overly broad and lacking in nuance, but narrowly tailored laws which restrict the teaching of content for specific reasons and include exceptions are likely constitutional.